

In support of MOE's intervention

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and	)	
STATE OF NEW YORK,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 79-988
	)	
HOOKER CHEMICALS AND PLASTICS	)	
CORP., <u>et al.</u> , (S-AREA LANDFILL),	)	
	)	
Defendants.	)	
	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION OF THE MINISTER OF THE
ENVIRONMENT OF THE PROVINCE OF ONTARIO TO
INTERVENE AS A PARTY PLAINTIFF

This litigation was brought by the United States on December 20, 1979, for injunctive relief against Hooker Chemicals and Plastics Corporation and various affiliated corporations (hereafter referred to collectively as Hooker). The State of New York, joined as a party defendant on Hooker's motion, was realigned as a plaintiff and, on November 18, 1980, filed its own complaint against Hooker. Both complaints seek injunctive

Remedy [remedy against Hooker to prevent the further migration of toxic chemicals from a waste disposal landfill owned by Hooker which was used for disposal of more than 63,000 tons of chemicals over a period of 28 years. Since October 1980, the parties

GOAL OF NEGOT. have conducted settlement discussions with the goal of formulating a remedial plan which will "abate and remedy the migration of chemicals from defendants' S-Area landfill and [] protect

the City's drinking water supplies and treatment plant."

Memorandum of United States in Response to Motion to Intervene
[filed by Niagara Environmental Action], p. 2 (hereafter
U.S. Intervention Response).

The Minister of the Environment of the Province of Ontario seeks to intervene on behalf of the citizens of Ontario whose interests may be directly affected by the outcome of this litigation, whether it be by settlement or by judgment. As described more fully in the accompanying complaint and in the complaint of the United States, the S-area landfill is situated at the edge of the Niagara River, being separated from the river only by a parkway. Complaint for Injunctive Relief and Restitution [USA], Map Exhibit (hereafter U.S. Complaint). It is, in fact, sited on porous land which was reclaimed from the river. Id., para. 14.; Answer of Defendants Hooker Chemicals & Plastics Corp., para. 13 (hereafter Hooker Answer). More than 63,000 tons of toxic chemicals have been dumped into this landfill. ^{1/} Hooker Answer, para. 16.

^{1/} According to Hooker's estimates, the following chemicals were deposited at the S-area landfill in these amounts.

<u>Type of Chemical Residue Categories</u>	<u>Quantity in Tons</u>
Organic Phosphorous	200
Miscellaneous Acid Chlorides	400
Phenol Tars	800
Thionyl Chloride	4,100
HET (Chlorendic) Acid	500
Miscellaneous Chlorination Residues	400

[footnote continued on next page]

A number of the chemicals which were deposited in the S-area landfill have been identified by the United States Environmental Protection Agency as toxic "priority" pollutants, such as benzene, chlorinated benzenes, endosulfan, hexachlorobutadiene, hexachlorocyclopentadiene, phenol, and dioxin. 45 Fed. Reg. 79318 (1980). Dioxin contained in the TCP wastes, deposited at the site, has been described as "arguably one of the deadliest compounds known to exist. Dioxin is carcinogenic, mutagenic, embryolethal, teratogenic and bioaccumulates 8,000-fold in aquatic organisms." Hang & Salvo, The Ravaged River, NYPIRG 1981, p. 168. Based upon the amount of TCP admittedly dumped in the site, these authors estimate that (ibid.):

between 125 and 145 pounds of dioxin are estimated to be buried in the landfill. Due to the extraordinary toxicity of dioxin, this amount is calculated to be capable of killing several million people or causing massive environmental pollution if released on a widespread scale.

[footnote continued from previous page]

<u>Type of Chemical Residue Categories</u>	<u>Quantity in Tons</u>
Dodecylmercaptans (DDM)	600
TCP (Trichlorophenols)	200
Benzoyl Chloride	3,300
LDS/MCT (Liquid Disulfides/ Monochlorotoluene)	2,200
Metal Chlorides	900
C-56 (Hexachlorocyclopentadiene)	17,400
Chlorobenzenes	19,900
Benzyl Chlorides	1,600
Thiodan (Endosulfan)	700
Sulfides	4,200
Miscellaneous Residues	5,700
	63,100

The United States has estimated the amount of wastes as 70,400 tons. U.S. Complaint, para. 17. Most of the discrepancy is in the estimate for DDM, which the United States puts at 8,100 tons.

Contaminants have been found in both the groundwater and sediments in and around the S-area site. Affidavit of Gerald E. Grisak, paras. 9, 12-18, Attachment A to the Complaint of Applicant Intervenor Minister of the Environment of the Province of Ontario (hereafter Grisak Affidavit and Ontario Complaint, respectively); Geologic Testing Consultants Ltd., S-Area Hydrogeologic Evaluation, a Report to the Niagara River Steering Committee, Ontario Ministry of the Environment, August 1982, pp. 39-40, Table 6, Figure 16, Appendices III, IV, V; ^{1/} EPA, Overview of Environmental Pollution in the Niagara Frontier, New York, March 1982, p. 168 (hereafter EPA Overview). Groundwater movement patterns in and around the S-area site will cause the contaminated water to move into the Niagara River. Grisak Affidavit, paras. 13, 16-17; U.S. Complaint, para. 23. A number of the chemicals deposited in the S-area site have been detected in the raw (as yet untreated) water drawn from the Niagara River into the drinking water treatment plant of the City of Niagara Falls. ^{2/} See City of Niagara Falls, New York, Water Treatment

^{1/} Copies of this report are being filed with the Court and the parties.

^{2/} It is not clear from the data whether all the contaminants found in the water were present as it was drawn from the river, or were to an unknown extent introduced through contact with contaminated sediments and sludge in intake structures of the plant itself.

Plant Investigatory Team Summary Report, May 7, 1980, pp. 47-48, 53 (hereafter Niagara Falls Summary Report).

The contamination of the Niagara River will inevitably affect Lake Ontario. "The Niagara is Lake Ontario's largest tributary, contributing 83 percent of the total input to the lake. * * * Water from the Niagara spends an average of 15 years in Lake Ontario before flowing down the Saint Lawrence River to the Atlantic Ocean." The Ravaged River, supra, p. 6. "Chemicals going into the Niagara River will, to a large extent, find their way into Lake Ontario. There they may accumulate in certain parts of the eco-system and pose a hazard to man." New York State Department of Environmental Conservation, Toxic Substances Control in the Niagara River -- a Preliminary Report, June 1981, p. 12.

Fish taken from Lake Ontario have been found to contain significant levels of the toxic compounds dioxin and mirex. Affidavit of John Ralston, paras. 9, 13, Attachment B to Ontario Complaint. Dioxin is one of the compounds found in the S-area site. Id., para. 7; The Ravaged River, supra, p. 168. Mirex, while not apparently deposited in the S-area site, has been found in sediments in the water treatment plant adjacent to the S-area, and has been detected in the raw water drawn into the plant. Niagara Falls Summary Report, supra, pp. 47-49; G.T.C. Report, Table 6. Mirex was first produced, then later processed, at the Hooker complex of which the S-area site is a portion. G.T.C. Report, p. 2; EPA Overview, p. 61; Ralston

Affidavit, para. 12. The documented migration of mirex can be taken as typical of the movement and bioaccumulation of persistent chemical substances in the Niagara River. Ralston Affidavit, para. 11.

The levels of dioxin and mirex in fish caught in Lake Ontario have caused the Ministry of the Environment of that Province to issue public warnings against unlimited consumption of such fish. Ralston Affidavit, para. 16. According to EPA (EPA Overview, p. 15):

Adult sport fish in Lake Ontario and the Niagara River are contaminated with persistent chemical substances to the extent that both New York and Ontario have issued health advisories that effectively prohibit or severely limit fish consumption. Substances of most concern include polychlorinated biphenyls (PCBs), mirex (a highly toxic pesticide), and dioxin (a highly toxic byproduct of trichlorophenol production).

Both dioxin and mirex are chemicals which are highly persistent in the environment and bioaccumulate in aquatic organisms. ^{1/} Id., paras. 5-7, 11. Through the process of bioaccumulation, even very low concentrations of contaminants in the ambient water can result in concentrations in organisms, especially those higher up the food chain such as fish, many thousand-fold higher. Id., para. 6. Other chemicals, including

^{1/} The persistence of dioxin is demonstrated by the situation of the Love Canal landfill. Hooker deposited approximately 125 to 145 pounds of dioxin at this site between 1942 and 1952 (about the same amount as was deposited in the S-area site). The Ravaged River, supra, p. 124. "Nearly three decades after the site ceased to serve as an active Hooker dump, dioxin and more than 80 other pollutants were discovered migrating through groundwaters flowing from the landfill." Ibid.

some of those deposited in the S-area landfill, are known to share these characteristics of persistence and bioaccumulation. Id., para. 10. They therefore may be expected to be present in aquatic organisms in far higher amounts than may be detected in the ambient water.

The waters of the Niagara River are the source of drinking water for some 70,000 citizens of Ontario Province resident in the City of Niagara Falls, Ontario. The waters of Lake Ontario provide drinking water for some 3,638,107 citizens of the Province of Ontario. Affidavit of George Missingham, paras. 5-6 and Exhibit A, Attachment C to Ontario Complaint.

If the levels of chemicals now contained in and leaching to the Niagara River and Lake Ontario reach levels which are recognized to be directly harmful to human health, it will be necessary to provide additional water treatment in order to protect the Ontario citizens who are dependent on these sources for their drinking water. Missingham Affidavit, para. 11. The costs of such additional treatment would be very great. For example, it could cost as much as three million dollars (Canadian) for additional treatment for the City of Niagara Falls, Ontario, alone. Ibid. Moreover, this figure does not include various costs of operation, carbon regeneration or replacement, or capital financing. Ibid.

The most likely technology for additional treatment, use of granular activated carbon as a filter, is not yet fully

developed. Ibid. Absorption of some contaminants may have the effect of displacing others previously absorbed with the result that there could be a sudden discharge of a high concentration of displaced contaminants. Ibid. In view of the technological and practical difficulties of additional water treatment, the only prudent course by which to ensure that the Niagara River and Lake Ontario remain sources of safe drinking water is to prevent the migration of toxic wastes into the Niagara River to the greatest extent possible. Id., para. 12.

Some of the chemical wastes from the S-area site are in a denser-than water form. These non-aqueous phase contaminants have been found in sediments in and near the S-area site. Grisak Affidavit, para. 18; G.T.C. Report, Table 6. Due to density variations, it appears that these contaminants have the potential to move through the bedrock southward, toward Ontario. Grisak Affidavit, paras. 19-20; Affidavit of Jack Viirland, Attachment D to Ontario Complaint, para 2; G.T.C. Report, pp. 37-38, 41, Appendix VI.

In order to represent the interests of the citizens of the Province, Ontario is seeking to intervene in this proceeding as a matter of right, as provided for in Rule 24(a)(2) of the Federal Rules of Civil Procedure. In the alternative, Ontario asks that the Court permit it to intervene, pursuant to Rule 24(b), through exercise of the Court's discretion. ^{1/}

^{1/} The accompanying complaint includes a claim under 33 U.S.C. 1365, a claim which is not present in the United States complaint, which would provide an independent basis for suit by Ontario under the Clean Water Act. If intervention is not granted pursuant to this motion, Ontario intends to pursue the independent legal remedy afforded by this statute.

ARGUMENT
I

20 USC

ONTARIO IS ENTITLED TO INTERVENE AS A MATTER OF
RIGHT UNDER RULE 24(a)(2) OF THE FEDERAL RULES OF
CIVIL PROCEDURE

Rule 24(a)(2) authorizes intervention as a matter of right when four criteria have been met. Foster v. Gueory, 655 F.2d 1319, 1324 (C.A.D.C. 1981). The applicant for intervention must make timely application, he must claim an interest in the subject of the action, he must be so situated that "the disposition of the action may as a practical matter impair or impede his ability to protect that interest," and the applicant's interest must not be adequately represented by existing parties to the litigation. Rule 24(a)(2). Ontario submits that each of these four criteria is fully met here.

A. THE APPLICATION TO INTERVENE IS TIMELY MADE

The complaints in this action were filed in 1979 by the United States government and in 1980 by the State of New York. No actual litigation has taken place; instead, the parties have so far been engaged in settlement negotiations. However, settlement has not yet been achieved and Ontario has been informed that settlement is now not likely.

It is well established that the question of timeliness is entrusted to the discretion of the court. United States v. First Fidelity Bank of Colome, 631 F.2d 568, 569 (C.A. 8, 1980); Black v. Central Motor Lines, Inc., 500 F.2d 407, 408 (C.A. 4, 1974). In the exercise of discretion all the circumstances

should be considered. Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 421 F. Supp. 415, 418 (E.D. Pa., 1976). The most important consideration is usually held to be the possible prejudice to the parties. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 84 F.R.D. 383, 399 (D. Kan. 1979). Thus a motion to intervene was held to cause no prejudice to the parties and to be timely where discovery had not been completed and no important decisions on the merits had been made. Jet Traders Investment Corp. v. Tekair, 89 F.R.D. 560, 568 (D. Del. 1981). Applying this standard to the instant case, Ontario's application is clearly timely since the parties have not even begun to litigate the issues.

Indeed, intervention has been permitted as timely at far later stages of litigation. For example, in United States v. Ketchikan Pulp Co., 74 F.R.D. 104, 107 (D. Alaska 1977), intervention was allowed two months after the complaint and consent decree were both filed with the court. Intervention was permitted by this Court in a closely analogous case in United States of America, et al. v. Hooker Chemicals and Plastics Corp., et al. (Hyde Park Landfill), CIV-79-989C, slip op., p. 33 (April 30, 1982), even though a consent decree, which intervenors wished to contest, had already been lodged with the Court. And in Natural Resources Defense Council v. Costle, 561 F.2d 904, 908 (C.A.D.C. 1977), the court permitted intervention where the purpose was to participate in the remedial phase of the litigation.

Ontario submits that there will be no prejudice to the interests of the parties if intervention is allowed. As we will discuss below, the basic concerns of Ontario are similar to those of the present plaintiffs. Intervention will not cause delay or, in view of the present posture of the case, require retracing procedural steps such as discovery.

A citizens group, Niagara Environmental Action, has recently applied for intervention in this action. The response of the U.S. government "does not contest the timeliness * * *." U.S. Intervention Response, supra, p. 25. Ontario's application for intervention is equally timely.

B. ONTARIO HAS AN INTEREST IN THE SUBJECT MATTER OF THIS LITIGATION

In order to intervene as a matter of right, the applicant must claim "an interest relating to the property or transaction which is the subject of the action * * *." Rule 24(a)(2). Commenting on this provision, the Court of Appeals for the District of Columbia Circuit noted in Nuesse v. Camp, 385 F. 2d 694, 700 (1967), that "we know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Accord, United States v. Reserve Mining Co., 56 F.R.D. 408, 413 (D. Minn. 1972).

The interest of a prospective intervenor should not be contingent. United States v. Carrols Development Corp., 454

F. Supp. 1215 (D. N.Y. 1978). However, there need not be a direct interest in the precise property or transaction. Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129, 135-136 (1967). In the present case, Ontario in fact has a direct, immediate interest in the subject matter of this litigation.

As stated in the accompanying complaint and in the attached affidavits, Ontario's interest in this suit is in the protection of the health and welfare of its citizens who are presently and will continue to be threatened by the presence in the waters of the Niagara River and Lake Ontario of a variety of toxic and hazardous chemicals which are migrating into those waters from the S-area landfill. Ontario's direct concern is that this migration be stopped. The U.S. government complaint brought in this action states that "the Hooker Chemical Corporation and its predecessors in interest disposed of their chemical wastes at the "S" Area landfill in Niagara County, New York. The migration of these wastes and the exposure of these wastes to human beings and the environment gives rise to this action." U.S. Complaint, para. 1.

More than 3 1/2 million citizens of Ontario derive their drinking water from the Niagara River and Lake Ontario. Missingham Affidavit, para. 5. Ontario citizens also catch and eat fish from Lake Ontario and the Niagara River. These fish ingest toxic chemicals from the water and from smaller aquatic organisms. Through the process of bioaccumulation,

the fish concentrate toxic substances in their tissues with the result that the levels of toxics in the fish may be many times greater than the concentrations in the ambient water. See Ralston Affidavit, paras. 6, 9, 13. Ontario has been forced to issue warnings to its citizens, cautioning them against free consumption of Lake Ontario fish because of levels of chemical contamination found in several fish species. Id., para. 16. Two of the chemicals of particular concern are dioxin and mirex. Dioxin was disposed of in the S-area landfill as part of the trichlorophenol wastes, and mirex has been detected at points adjacent to the S-area. Ralston Affidavit, para. 7; G.T.C. Report, Table 6. There is reason to conclude that these chemicals, which are known to be migrating from the site and adjacent areas, are leaching into the Niagara River and Lake Ontario where they contribute to the contamination of the fish. Id., paras. 7-14. Ontario has a direct interest in preventing further contamination caused by the migration of these and other hazardous chemicals from the S-area landfill so as to protect the health and welfare of the citizens of the Province.

The concern of Canadian citizens over pollution in any of the Great Lakes has been specifically stated in the Agreement Between the United States of America and Canada on Great Lakes Water Quality, 1978, Treaties and Other International Acts Series 9257, p. 2. That agreement, which reaffirmed a similar 1972 agreement, noted the continuing concern "about the impairment

of water quality on each side of the boundary to an extent that is causing injury to health and property on the other side, as described by the International Joint Commission * * *." Ibid.

One of the programs called for under the American-Canadian agreement is to include "requirements for the substantial elimination of discharges into the Great Lakes System of persistent toxic substances * * *." Id. at 8. The need to eliminate such toxic discharges continues to be recognized. According to the Special Report, under the 1978 Great Lakes Water Quality Agreement, on Pollution in the Niagara River, International Joint Commission, January 20, 1981, pp. 3-4;

[T]he [International Joint] Commission is concerned about the quality of the Niagara River and its effects on Lake Ontario. This concern increases with the growing realization of the presence and effects of both the many abandoned or improperly-operating hazardous waste disposal sites (some of which have been found to be leaching pollutants to the Niagara River), and new or newly-found substances in the ecosystem at concentrations that may be problematic.

In short, Ontario has a direct interest in preventing the migration of chemicals from the S-area site into the Niagara River and then Lake Ontario. Since such prevention is the purpose of this litigation, Ontario has a direct interest in the subject matter of this suit.

C. THE DISPOSITION OF THIS ACTION MAY IMPAIR THE ABILITY OF ONTARIO TO PROTECT ITS INTEREST

The third criterion for intervention as of right under Rule 24(b)(2) is that the applicant is so situated that disposition

of the action without his intervention may impair his ability, as a practical matter, to protect his interest.

Impairment of interest may take a legal form, as where the decision will have a stare decisis effect thus effectively precluding further litigation. New York Public Interest Research Group v. Regents of the University of the State of New York, 516 F.2d 350, 352 (C.A. 2, 1975). However, as the language of the rule makes clear, it may also be an impairment as a practical matter. "[T]he court is not limited to consequences of a strictly legal nature." Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341, 1345 (C.A. 10, 1978).

In the instant case, the interest of Ontario may be impaired by the outcome of this litigation, whether it is by decision or by settlement, as both a legal and a practical matter. As a legal matter, any judicial determination as to Hooker's responsibility for containing or cleaning up the hazardous wastes present at the S-area site will have, if not res judicata or collateral estoppel effect, then at least the effect of stare decisis. A settlement approved by the Court would likewise be effectively determinative of the rights and responsibilities of the parties.

Moreover, resolution of this litigation without the participation of Ontario may well impair the interest of the Province as a practical matter. The interest of Ontario in preventing further contamination of the Niagara River differs,

at least in emphasis, from that of the present plaintiffs. As the documents filed in this case make clear, the primary focus of the plaintiffs is on protection of the drinking water supply of the City of Niagara Falls, mainly through preventing chemicals from the S-area site from migrating into the area of the city's drinking water plant which is located some 200 yards away. U.S. Complaint, paras. 24-38; Complaint of the State of New York, p. 9; U.S. Intervention Response, pp. 26, 31-33. ^{1/} The U.S. government has described the purpose of its suit as seeking "the collection and containment of chemicals migrating from the Hooker dump and the protection of the City's drinking water and water treatment plant." U.S. Intervention Response, p. 26.

Since shielding the drinking water supply from chemical contamination is apparently the primary goal, it is logical to assume that the remedial measures sought by the U.S. government and the State of New York will stress protection of the drinking water plant. Ontario does not, of course, question that this goal is critical, but urges that other effects of chemical contamination produced by the S-area landfill must also be considered and the remedial measures adopted must deal with

^{1/} The U.S. government response to Niagara Environmental Action takes issue with the "charge that the government has not acted to protect Applicant's members interests in consuming safe drinking water. * * * Indeed, that is what the present case is all about." U.S. Intervention Response, 33. This statement demonstrates that the thrust of the case is the effect of the chemical migration on the drinking water treatment plant and the water supply it produces. Indeed, the relative lack of stress placed on the quality of water in the Niagara River is demonstrated by the U.S. government's rather offhand reference to that problem in a footnote. Id. at 26.

those effects as well. Ontario is particularly concerned with the leaching of contaminants into the Niagara River and then into Lake Ontario. Ontario is also concerned with the seepage, actual or potential, of dense chemicals into the bedrock beneath the S-area site and then southward into Ontario. See Grisak Affidavit, paras. 18-20; Viirland Affidavit, para. 2. The interest of Ontario is therefore in designing remedial measures which will not only protect the drinking water treatment plant but which will also address these other paths of chemical migration and contamination. If the measures adopted, whether through settlement procedures or through litigation, do not prevent leaching into the river or seepage through bedrock, then the interests of Ontario citizens will continue to be damaged in spite of the conclusion of this litigation.

Moreover, it is entirely possible that the steps which might be taken pursuant to a settlement or a decision would offer protection against some harms at the cost of precluding prevention of other harms. For example, measures to prevent further seepage into the neighboring site of the drinking water treatment plant could render impossible or impractical later steps to halt the seepage of dense pollutants into the bedrock. Or the measures could so affect the flow of contaminated groundwater that an increased amount would actually be leached directly from the landfill into the river. ^{1/}

^{1/} Ontario is aware, as this Court has pointed out, that intervention would not permit it to "block" a settlement into which other parties wish to enter between themselves. Hyde
[footnote continued on next page]

In view of the practical and legal effects which this litigation will have on the interests of the citizens of Ontario, Ontario has the right to become a party to the litigation so as to ensure that the remedies adopted will address all of the effects of the chemical contamination originating in the S-area landfill.

D. THE INTERESTS OF ONTARIO ARE NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES TO THIS LITIGATION

The final factor to be considered where application for intervention as a matter of right is made is whether the interest of the applicant is adequately represented by the existing parties. We submit that the interests of Ontario are not adequately represented and that therefore intervention should be allowed.

It has been repeatedly held that this portion of Rule 24(a)(2) is "satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of America, 404 U.S. 528, 538, note 10 (1972). Accord, Foster v. Gueory, supra, 655 F.2d at 1325; United States Postal Service v. Brennan, 579 F.2d 188, 191 (C.A. 2, 1978); Natural Resources Defense Council v. Costle, supra, 561 F.2d at 913; Town of North Hempstead v.

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Park case decision, supra, p. 35. It is Ontario's purpose, rather, to bring its particular concerns to the attention of the parties and the court and to assist in identifying remedial measures which will prevent further adverse effects on Ontario's interests. Moreover, if a settlement failed to protect Ontario's interests, it would be free to continue its litigation to obtain an effective remedy.

Village of North Hills, 80 F.R.D. 714, 716 (E.D. N.Y. 1978); United States v. Reserve Mining Company, 56 F.R.D. 408, 414 (D. Minn. 1972). The Court of Appeals for the District of Columbia Circuit has ruled that "an applicant to intervene need only show that the representation of his interest may be inadequate; the burden of proof rests on those resisting intervention." Securities and Exchange Commission v. Dresser Industries, Inc., 628 F.2d 1368, 1390 (1980). The general rule is summarized in Wright & Miller, Federal Practice and Procedure (Civil), Vol. 7A, p. 533:

If there is a significant difference between the interest of the absentee and that of the party, there is a risk that the party will not provide adequate representation of the interest of the absentee. A discriminating appraisal of the circumstances of the particular case is required, but since the rule is satisfied if there is a serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf.

The present parties to this litigation are the United States, the State of New York, the City of Niagara Falls and Hooker. A citizens group, Niagara Environmental Action, has moved to intervene as a party plaintiff.

The present plaintiffs share with Ontario the general interest in containing and cleaning up the S-area pollutants. However, as we have discussed above, the specific focus of the plaintiffs appears to be preventing further contamination of the drinking water treatment plant, rather than stopping the leaching of chemicals into the Niagara River or the seeping of

pollutants into the bedrock under the site. Ontario's interest in eliminating sources of pollution from the drinking water of its citizens and from the fish they consume is not presently represented before this Court.

A generally shared interest in the object of the suit is not sufficient to make the representation of the existing parties adequate. In Natural Resources Defense Council v. Costle, supra, 561 F.2d at 912, the court of appeals reversed a lower court's denial of intervention, pointing out that "a shared general agreement with appellants that the regulations should be lawful does not necessarily ensure agreement in all particular respects about what the law requires." Referring to Nuesse v. Camp, supra, 385 F.2d 694, where the court noted that interests need not be adverse but only different, the court explained (id., note 41):

The point of Nuesse is not that intervention is only warranted when the applicant has a more general interest than the existing party, but rather is that representation may not be adequate when the parties have different scopes to their interest, i.e., when their "interests may not coincide." (emphasis in original)

The court concluded that the applicant industry intervenors should be allowed to participate (561 F.2d at 913):

In light of the "minimal burden" upon applicants, to show that representation "may be" inadequate, Trbovich, supra, we find that the special and distinct interests of appellants, even as to the existing industry parties, justify their admission under Rule 24(a)(2).

In several cases, where a governmental agency has been a party, courts have held that there may be a presumption of adequacy of representation under the doctrine of parens patriae. In Environmental Defense Fund v. Higginson, 631 F.2d 738, 740 (C.A. D.C. 1979), the court acknowledged that "an individual seeking intervention ordinarily is required to make only a minimal showing that representation of his interest may be inadequate." The court then went on to point out that "under the parens patriae concept, however, a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens." Ibid. Thus, the intervention in the instant case of the Niagara Environmental Action has been opposed by the United States solely on the ground that the interests of the citizens are adequately represented by the governmental parties. ^{1/} U.S. Intervention Response, pp. 25-34.

It is self-evident that neither the United States government nor the State of New York can act as parens patriae for the citizens of the Province of Ontario. Therefore, even if the doctrine of parens patriae means that the United States and New York may be presumed to represent adequately all citizens of the United States and New York, respectively, they obviously cannot adequately represent a foreign government and its citizens. ^{2/}

^{1/} The presence of the other criteria for intervention under Rule 24(a)(2) has not been challenged. U.S. Intervention Response, p. 25.

^{2/} The right of a foreign government or agency to bring suit in the courts of the United States is, of course, established in Article III, Section 2 of the Constitution, and through long-standing judicial precedent. See, e.g., The Sapphire, 78 U.S. [footnote continued on next page]

Therefore, the standard to be applied in this case is that the applicant must only satisfy the "minimal burden" of showing that representation by existing parties may not be adequate. We submit that the existence of differing interests which have a significant relation to the remedial measures sought or agreed upon demonstrates that Ontario's interests are not adequately represented by the present parties. Intervention as a matter of right should therefore be granted.

II

ONTARIO SHOULD BE PERMITTED TO INTERVENE IN THE SOUND EXERCISE OF THIS COURT'S DISCRETION

In the alternative, Ontario asks that it be permitted to intervene under Rule 24(b) (2) of the Federal Rules of Civil Procedure. This rule allows the Court to permit intervention when the applicant's claim has a question of law or fact in common with the main action. The rule further requires that intervention should not "unduly delay or prejudice the adjudication of the rights of the original parties."

A. ONTARIO'S CLAIM HAS QUESTIONS OF BOTH LAW AND FACT IN COMMON WITH THE PRESENT ACTION

A motion for permissive intervention is addressed to the sound discretion of the court. The first question to be determined is whether the applicant's claim has questions of

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(11 Wall.) 164 (1870); Principality of Monaco v. State of Mississippi, 292 U.S. 313, 323, note 2 (1934); In Re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 748-749 (C.D. Cal. 1975). See also Wilderness Society v. Morton, 463 F.2d 1261, 1262 (C.A.D.C. 1972) (permitting intervention of Canadian citizens and a Canadian environmental group).

law or fact in common with the claims in the main action.

Stallworth v. Monsanto Co., 558 F.2d 257, 263 (C.A. 5, 1977);
Associated Students of University of California at Riverside
v. Kleindienst, 60 F.R.D. 65, 68 (S.D. Cal. 1973).

As we have discussed above, the interest of Ontario is in preventing further migration of hazardous chemicals from the S-area landfill into the Niagara River and Lake Ontario. The presence of these chemicals in the landfill and their migration from it are the factual bases for the complaints of the United States and the State of New York. The questions of fact regarding the landfill and the migration of hazardous chemicals are virtually identical.

The complaint of Ontario likewise rests largely on the same legal bases as the complaint of the United States. ^{1/} The

^{1/} The U.S. government bases its action on Section 1431 of the Safe Drinking Water Act, 42 U.S.C. 300i, on Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, on Section 504 of the Clean Water Act, 33 U.S.C. 1364, on Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, and on the common law of nuisance. U.S. Complaint, para. 2. The claims of the State of New York are based solely on the laws of that state. Ontario's complaint is based on Sections 504 and 505 of the Clean Water Act, 33 U.S.C. 1364, 1365, on Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, and on the common law of nuisance.

The Ontario complaint differs from that of the United States in that it relies on Section 505 of the Clean Water Act, alleging violation of Section 301(a), 33 U.S.C. 1311(a), because Hooker has not obtained a permit for discharge of pollutants from a point source as required by 33 U.S.C. 1342. Hooker admits that it owns the S-area landfill, that it has dumped more than 63,000 tons of chemicals into the S-area, that certain of these chemicals have been detected in water samples, that leachate has migrated into the bedrock below the S-area. Hooker Answer, paras. 4, 16, 17A(3), 17B(3), 17C(3), 17D(3), 19, 21, 22, 27, 28, and 29. It is undisputed that the chemicals dumped into the landfill are pollutants. Thus, it is established that there has been a discharge of pollutants.

[footnote continued on next page]

relief sought, the containment of the chemicals so as to prevent further migration into the Niagara River or seepage from the site into bedrock, is similar to the relief sought by the United States and the State of New York. See U.S. Complaint, para. 85A; Complaint of the State of New York, Prayer for Relief, para. 1a. Those elements of relief which would derive from Ontario's particular interests and concerns would not differ in kind from those sought by the present parties. Thus, Ontario's claims have both factual and legal bases in common with those of the United States. Intervention by Ontario would neither significantly broaden the factual or legal issues nor complicate the matters before this Court. Intervention should therefore be permitted.

B. THE INTERVENTION OF ONTARIO WILL NOT DELAY OR PREJUDICE
THE ADJUDICATION OF THE RIGHTS OF THE PARTIES

The second requirement for permissive intervention is that the intervention must not unduly delay or prejudice the

[footnote continued from previous page]

Since the S-area landfill is a point source of pollutants, a permit is required. In United States v. Earth Sciences, Inc., 599 F.2d 368 (C.A. 10, 1979), the court held that mine water wastes which overflowed into navigable waters as a result of heavy rains constituted discharge from a point source. The court distinguished nonpoint source pollution, based upon the legislative history of the Clean Water Act, as "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." Id. at 373. In a complaint filed in this Court asking for injunctive relief against Hooker and Olin Corporation for migration of chemicals into the Niagara River from a 21-acre landfill (the 102nd Street Landfill), the government included a claim for relief alleging violation of Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. 1311(a) and 1342, which require that a person discharging pollutants from a point source obtain a permit. The government's complaint, in paragraph 77, stated that "Hooker's and Olin's 102nd Street landfill is a discrete conveyance of pollutants to waters of the United States and therefore constitutes a point source as defined in Section 502 (14) of the Clean Water Act, 33 U.S.C. 1362(14)." The same description fits the S-area landfill.

rights of the original parties. 1/

In determining whether or not there may be prejudice to the rights of the parties, courts generally look to such questions as whether intervention would delay the litigation, would add significant new issues or claims, or would enhance the potential liability of the defendant. Benson v. Little Rock Hilton Inn, 87 F.R.D. 447, 448-449 (E.D. Ark. 1980) (no prejudice where the case had not gone to trial and where intervention would not broaden the claims or enhance the potential liability of the defendants); Christy v. Hammel, 87 F.R.D. 381, 394 (M.D. Pa. 1980) (procedural posture of the case was such that intervention would cause no undue problems or delay); Gatter v. Cleland, 87 F.R.D. 66 (E.D. Pa. 1980) (no prejudice where complaint was substantially identical to that of the plaintiffs and was timely); Mothan v. Temple University of the Commonwealth System of Higher Education, 93 F.R.D. 585 (E.D. Pa. 1982) (intervention denied because of 6 1/2 year delay in filing and because intervenors' contributions would be superfluous).

Intervention of Ontario in the instant case would not cause undue delay in this litigation, which has been effectively in suspense since its inception, or broaden the claims, or enhance the defendants' liability. The goals sought by the present

1/ Rule 24(b) also requires that the application for leave to intervene be timely. We have shown above that the application here is timely.

plaintiffs are similar to those sought by Ontario. Like the plaintiffs, Ontario wants to eliminate the chemical pollution caused by the S-area landfill. Moreover, it is one of Ontario's particular concerns that the resolution of this case be reached as promptly as possible so that the necessary remedial measures can be begun to prevent further contamination of the Niagara River and Lake Ontario. Ontario therefore has no desire to cause delay in this resolution. The only change that may be caused to the defendants' position would result only from the failure of the other parties to ensure adoption of remedial measures which will protect the interests of Ontario as well as of the United States. There is therefore no potential for prejudice to the parties which would prevent intervention.

CONCLUSION

For the reasons stated above, the Minister of the Environment of the Province of Ontario should be allowed to intervene in this action as a party plaintiff as a matter of right or, in the alternative, in the sound exercise of this Court's discretion.

Respectfully submitted,

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